Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	CS Docket No. 98-201
	)	RM No. 9335
Satellite Delivery of Broadcast	)	RM No. 9345
Network Signals Under the	)	
Satellite Home Viewer Act	)	

COMMENTS OF
PEGASUS COMMUNICATIONS CORPORATION

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SUMMARY

Pegasus commends the Commission for engaging in the proposed rulemaking. The Commission should move expeditiously to exercise its statutory authority to define "signal of Grade B intensity" in such a manner as to promote the public interest while remaining true to the purposes of the Satellite Home Viewer Act ("SHVA").

In enacting the SHVA, Congress promoted the public interest by meeting the concerns of satellite home viewers and carriers to foster efficient television delivery via satellite while respecting the rights of copyright owners to receive payment for the use of their property. The SHVA also promoted and preserved competition in the multichannel video programming marketplace, particularly with regard to cable television. Finally, the SHVA respected the network/affiliate relationship and promoted localism. In this latter regard, the SHVA created an exception to the exclusive copyrights of television networks and affiliates in their programming by permitting the retransmission of network signals to persons who reside in "unserved households." The purpose of this limitation was to make sure that satellite carriers do not provide network signals to "served" households and thereby jeopardize the network/affiliate relationship that serves as the foundation for over-the-air broadcasting in the United States.

The words "unserved household" are a defined term in the SHVA. The definition, plain on its face, restricts delivery of network programming to households that "cannot receive through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. §119 (d)(10)(A) (emphasis added). The legislative history confirms this clearly stated textual message.

However, the Commission has never defined "signals of Grade B intensity" or "Grade B" specifically for purposes of the SHVA. In fact, the Commission's rules never define the words "Grade B intensity" for any purpose, and the rules defining the "Grade B contour" and similar concepts are clearly not adequate for purposes of applying the SHVA's "unserved household" restriction.

The meaning of "unserved household" has been the subject of intense litigation in at least five lawsuits. Moreover, influential members of Congress and the Executive Branch have expressed serious concerns to the Commission about the issues raised in the petitions. The Copyright Office ("Office") conducted a review of the copyright licensing regimes governing the retransmission of over-the-air radio and television broadcast signals and issued a report stating that the "unserved household" restriction was designed as a surrogate for the network nonduplication rules of the Commission applicable to the cable industry. The Office further observed that no similar rule existed for the satellite industry at the time of passage of the SHVA and no such rule exists today. In the absence of such a rule, the unserved household restriction has created considerable litigation, legislative and consumer turmoil.

In response to the turmoil, the Commission initiated this proposed rulemaking and in its notice of proposed rulemaking raised numerous questions. In providing answers to the principal questions, Pegasus submits that the Commission should keep two "big picture" concerns in mind: first, the public interest in balancing the television networks desire to protect their local "franchise" (*e.g.*, network/affiliate relationship) against importation of "distant signals" with the consumers' desire to receive network programming that cannot be received over-the-air from a local affiliate; and, second, the public interest in enabling satellite companies to become more effective competitors to cable television companies, which interest cannot be served if the

satellite television industry is burdened by regulatory constraints that are more burdensome than those to which the cable television industry is subject.

Pegasus offers the following guidance:

1. The Commission has authority to address the issues presented in the notice of proposed rulemaking. The Commission tentatively concludes that Congress did not "freeze" the definition of Grade B intensity for SHVA purposes. The Commission's conclusion is correct. Neither the plain language of the statute nor the pertinent legislative history lead to a conclusion that the Commission lacks authority and responsibility for defining "an over-the-air signal of Grade B intensity." A consistent model for predicting, and accompanying rules for measuring, Grade B intensity are clearly necessary. The Commission is uniquely qualified to develop the model and rules.

2. The Commission has authority to define what constitutes a signal of Grade B intensity. In its Notice, the Commission aptly observes that it has the authority, as a general matter, to revise any of its rules, as long as it explains the reasons for doing so. In light of the SHVA's delegation of authority to the Commission, this proposition is irrefutable. The SHVA could even be construed as requiring the Commission to establish a definition of "signal of Grade B intensity." Significantly, nothing in current Commission rules was ever contemplated by the Commission to define "Grade B intensity" for purposes of identifying an "unserved household" under the SHVA. The Commission has never defined such a standard, and in fact has nothing in its rules for predicting a level of signal strength at a given point. But, given the level of controversy that has arisen, the public interest as well as the interests of both local broadcasters and satellite companies will be best served by development by the Commission of a new predictive standard and rules for measuring it. Pegasus responds to some of the Commission's

questions about the Longley-Rice propagation model and makes several suggestions about how Longley-Rice can be improved within the context of the SHVA.

3. The Commission has authority to develop a predictive standard for determining "unserved households" as defined in the SHVA and should not only adopt a standard but also methods to apply the standard. In establishing such a definition, the Commission should consider a standard that all parties can apply with a minimum of analysis, cost and dispute. Pegasus urges that the Commission first consider creating a well-defined geographic area wherein satellite service of a network signal is not permitted (a "red zone"). Within that zone, the satellite company would know that it cannot sell distant network service to a consumer; outside the zone, it would presumptively be free to provide the service subject to certain conditions developed by the Commission (a "yellow zone").

Obviously, while postulating the creation of such zones is easy, the real crux of the issue is the size of the zone that should be adopted. In making this determination, the "big picture" criteria set forth above must be considered. Pegasus submits that the Commission has already established a standard for a "red zone" which meets these criteria, and which could easily be applied in this arena: the network non-duplication rules. Outside of the "red zone," Pegasus discusses the use of a methodology that would provide a more objective prediction of whether an individual household could receive an acceptable network signal than is currently the case. If the home is in an area not predicted to receive a Grade B signal using a Longley-Rice measurement, the satellite carrier should be allowed to provide distant network service. However, because homes beyond the 35-mile zone are beyond the area in which a television station would have exclusivity protection versus a cable system, to preserve some degree of a level playing field between direct broadcast satellite and cable, Longley Rice should be utilized with certain

modifications to that which is traditionally utilized for other broadcast purposes. Finally, Pegasus asks the Commission to examine state-of-the-art predictive methodologies that may more accurately predict "signal of Grade B intensity" for purposes of the SHVA.

4. The Commission has authority to develop an easy-to-use and inexpensive method for testing the strength of a network signal at an individual household and should do so. By establishing certain presumptions, the new predictive system should help to resolve many of the contentious issues as to whether or not a particular area is entitled to receive distant network service. Even so, in the case of individual households, disputes may still arise. The Commission aptly observes that "individual testing is the key safety net mechanism under the SHVA for proving that a specific household is unserved and thus eligible under the law to receive satellite delivery of network affiliated television stations." As a starting point, any testing methodology must be simple, inexpensive, and easy to use, and must approximate real world conditions.

In conclusion, the Commission has statutory authority to engage in this proposed rulemaking and should take immediate steps to define what constitutes a "signal of Grade B intensity" for purposes of the SHVA, and should set forth predictive standards and methods for determining its application generally and on an individual household basis, if necessary.

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COMMENTS OF
PEGASUS COMMUNICATIONS CORPORATION

Pegasus Communications Corporation ("Pegasus") submits these comments in response to the Notice of Proposed Rulemaking ("Notice"), published at 63 Fed. Reg. 67,439 (Dec. 2, 1998), in the above-captioned proceeding.[1]

BACKGROUND

Pegasus, a publicly traded company founded in 1991, is one of the fastest growing media companies in the United States. Pegasus is uniquely situated to comment in this proceeding because it owns and operates the following direct broadcast satellite television ("DBS"), broadcast television and cable television businesses:

- Pegasus Satellite Television is the nation's largest independent provider of DIRECTV, and the nation's fifth largest DBS provider. Pegasus is the exclusive provider of DIRECTV to territories comprising approximately 4.6 million rural homes in 36 states, and serves approximately 435,000 subscribers.

[1] The Notice was initially released to the public in written form on November 17, 1998.

- Pegasus Broadcast Television operates and/or programs ten television stations reaching approximately 2 percent of the nation's households. The stations are affiliated with the FOX, WB and UPN networks.

- Pegasus Cable Television operates cable systems in western and southwestern Puerto Rico serving almost 20 percent of the island's households, and previously operated cable systems in New England.[2]

The market in which DBS has enjoyed the greatest success is rural America and it is that market that Pegasus focuses on serving. It is that same market that is the focal point of the Satellite Home Viewer Act of 1988,[3] as amended in 1994[4] ("SHVA").

Through enactment of the SHVA, Congress promoted the public interest by meeting the concerns of satellite home viewers and carriers to foster efficient television delivery via satellite while respecting the rights of copyright owners to receive payment for the use of their property. The SHVA also promoted and preserved competition in the multichannel video programming marketplace, particularly with regard to cable television. Finally, the SHVA respected the network/affiliate relationship and promoted localism. In this latter regard, the SHVA created an exception to the exclusive copyrights of television networks and affiliates in their programming by permitting the retransmission of network signals to persons who reside in "unserved households" – the so-called "white area" restriction. The purpose of this limitation was to make sure that satellite carriers do not provide network signals to "served" households and thereby jeopardize the network/affiliate relationship that serves as the foundation for over-the-air broadcasting in the United States.

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[2] The foregoing business description for Pegasus satellite, broadcast and cable television entities incorporates and gives effect to certain pending acquisition transactions.

[3] Pub. L. No. 100-667 (1988).

[4] Pub. L. No. 103-369 (1994).

The words "unserved household" are a defined term in the SHVA. The definition sets forth two independent prongs. The first prong – the subject of the above-referenced proposed rulemaking – limits delivery of network programming to households that "cannot receive through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network."[5] 17 U.S.C. §119 (d)(10)(A). The second portion of the definition of "unserved household" requires that a customer not have obtained network programming from a cable system within 90 days before signing up for the satellite delivery of network programming. *Id.* at (B). This latter restriction was imposed by Congress to discourage customers from canceling their cable subscription (and reception of local network signals) to receive distant network stations. *See* H.R. Rep. No. 100-887, pt. 1, at 27 (1988). Only the first prong of the statutory definition is the subject of the Notice.

The language of the SHVA is plain on its face. The standard for determining whether a household is "unserved" is an objective one: a "household . . . that cannot receive through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network . . . ." 17 U.S.C. § 119(d)(10)(A) (emphasis added.)

There is little need to resort to legislative history to understand the clarity of the text. Nonetheless, the legislative history can be examined to confirm the textual message. *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511 (1993).

[5] The Federal Communications Commission is hereinafter referred to as "Commission."

As explained in Committee reports, the definition of "unserved household" refers to the FCC's longstanding recitation of "Grade B" signal strengths in 47 C.F.R. § 73.683(a).[6] *See* H.R. Rep. No. 100-887, pt. 1, at 26 (1988); H.R. Rep. No. 100-887, pt. 2, at 25-26 (1988). *See also* 134 Cong. Rec. 32,056 (Oct. 20, 1988) (incorporation of House Report (pt. 1) into Senate floor debate by Sen. Patrick Leahy); 134 Cong. Rec. 31,853 (Oct. 19, 1988) (incorporation of House Report (pts. 1 & 2) into House floor debate by Chairman Robert W. Kastenmeier). (Senator Leahy and Representative Kastenmeier served as the SHVA floor managers in the Senate and House, respectively.)

The legislative history also confirms that the SHVA was enacted to stimulate the delivery of network television to households in rural areas of the country that cannot receive adequate signals:

> "The goal of the bill is to stimulate communications, especially to unserved areas of the country, and to place rural households on a more or less equal footing with their urban counterparts." 134 Cong. Rec. 28,582 (Oct. 5, 1988) (remarks of Chairman Kastenmeier) (emphasis added).
>
> "The Senate has before it legislation that will help those who live in rural areas . . . ." 134 Cong. Rec. 32,055 (Oct. 20, 1988) (statement of Sen. Leahy) (emphasis added).

To achieve the policy objective of helping individuals "who live on the wrong side of the mountain" (Senator Leahy's words), 134 Cong. Rec. 32,055-56 (Oct. 20, 1988), Congress established a standard – the field strength of a signal – to determine whether a household is

[6] Section 73.683 sets forth "Grade B" field strength contours (or contour values which represent field strength in dB above one micro-volt per meter) for each television channel: 47 dBu for Channels 2-6, 56 dBu for Channels 7-13, and 64 dBu for Channels 14-69. The Commission's field strength contour regulations which currently only define Grade A and Grade B contours for purposes of tower siting and the multiple ownership rules do not provide assurance of actual signal strength to the viewer.

"unserved." The use of the Grade B standard was confirmed in the 1994 amendments to SHVA.[7] *See* Pub. L. No. 103-369; H.R. Rep. No. 103-703, at 13 (1994); S. Rep. No. 103-407, at 9 n.4 (1994).

However, the Commission has never defined "signals of Grade B intensity" or "Grade B" specifically for purposes of the SHVA. In fact, the Commission's rules never define the words "Grade B intensity" for any purpose, and the rules defining the "Grade B contour" and similar concepts are clearly not adequate for purposes of applying the SHVA's "unserved household" restriction.

The meaning of "unserved household" has been the subject of intense litigation. In the Southern District of Florida, a judge has issued a preliminary injunction with nationwide effect.[8] By consent of the parties, the injunction will take effect on February 28, 1999. In a similar lawsuit brought in the Middle District of North Carolina, a permanent injunction was ordered.[9] In determining remedies, the two courts used different predictive models for measuring Grade B intensity. Neither model is recognized by the SHVA. A third lawsuit has been brought by an

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[7] The 1994 amendments attempted to craft transitional signal measurement provisions. These provisions have proved to be unworkable.

[8] *CBS, Inc., et al. v. PrimeTime 24 Joint Venture*, 9 F. Supp. 2d 1333 (S.D. Fla. 1998); *CBS, Inc., et al. v. PrimeTime 24 Joint Venture*, No. 96- 3650- CIV (S.D. Fla. July 10, 1998) (Supplemental Order Granting Plaintiff's Motion for Preliminary Injunction). The Florida court made the following findings of fact: (a) PrimeTime 24 utilized a "subjective" standard for Grade B signal intensity; (b) PrimeTime 24 routinely activated subscribers that would not have met any likely objective standard of Grade B intensity. The court also found that the SHVA defines an "objective" standard for Grade B intensity and went the further step of accepting a predictive standard for Grade B intensity proposed by the plaintiff broadcasters (Longley-Rice Version 1.2.2). The Longley-Rice model is further explained in the Notice. *See* 63 Fed. Reg. 67,445-46. The court enjoined PrimeTime 24 from activating subscribers within the predicted contours unless PrimeTime 24 had previously conducted actual Grade B signal tests at a specific household in a manner prescribed by the court after notice (15 days) to affected local broadcasters.

[9] *ABC, Inc. v. PrimeTime 24, Joint Venture*, 17 F. Supp. 2d 467 (M.D.N.C. 1998). The North Carolina court made similar findings of fact, and also concluded that the SHVA creates an objective standard and implemented a predictive standard (a 75-mile range from the affiliate's transmitting tower rather than Longley-Rice 1.2.2).

NBC affiliate in Texas and awaits judgment.[10] Further litigation has been brought in Colorado against the television networks by Echostar Communications Corporation ("Echostar") asking a federal court to rule that the Commission has never endorsed a particular model for predicting or measuring Grade B intensity for purposes of the SHVA.[11] The Echostar suit further asks the court to develop a clean, uniform standard to determine which households are eligible to receive distant signals over satellite. In response, one of the television networks initiated a new lawsuit in the Southern District of Florida against Echostar for violating the SHVA.[12]

In the wake of the foregoing litigation activities, the National Rural Telecommunications Cooperative ("NRTC") and Echostar filed emergency petitions for this rulemaking. The NRTC petition proposes that the Commission adopt a predictive standard that would define as served all households within a contour that are predicted to receive off-air reception 100% of the time with "readily available, affordable receiving equipment." The Echostar petition proposes a predictive standard that would define as served an area in which 99% of the homes are predicted to receive an off-air signal 99% of the time with a 99% confidence level.

Influential members of Congress (including the original sponsor of the "white area" amendment, Representative Rick Boucher[13]), and the Executive Branch[14] have expressed serious

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[10] *Kannan Communications, Inc. v. Primetime 24 Joint Venture*, No. 2-96-CV-086 (N.D. Tex.).

[11] Plaintiff's Original Complaint and Request for Declaratory Judgment, *Echostar Communications Corp., et al, v. CBS Broadcasting, Inc. et al.*, Civil Action No. 98-B-2285 (D. Colo. filed October 19, 1998).

[12] *CBS Broadcasting, Inc. v. Echostar Communication Corp.*, 98-2651-CIV-NESBITT (S.D. Fla. filed Nov. 6, 1998).

[13] Letter to Hon. William E. Kennard from Hon. Rick Boucher (on behalf of 22 other members of Congress) (Aug. 7, 1998). Other influential members of Congress have sent similar letters to the Commission. *See, e g.*, Letter to William E. Kennard from Hon. Tom Bliley and Hon. John McCain (Aug. 19, 1998).

[14] Letter to Hon. William E. Kennard from Hon. Larry Irving (Sept. 4, 1998).

concerns to the Commission about the issues raised in the petitions. At the request of Senator Orrin Hatch, Chairman of the Senate Committee on the Judiciary, the Copyright Office ("Office") conducted a review of the copyright licensing regimes governing the retransmission of over-the-air radio and television broadcast signals. After two days of hearings on the subject, the Office issued a report stating that the "unserved household" restriction was designed as "a surrogate for the network nonduplication rules of the FCC applicable to the cable industry."[15] The Office further observed that no similar rule existed for the satellite industry at the time of passage of the SHVA and no such rule exists today.[16] In the absence of such a rule, the "unserved household restriction has created considerable turmoil not only between satellite carriers and broadcasters, but between consumers and the federal government."[17] The Office concluded that the restriction is essentially a "communications regulation" that "appropriately belongs" in the province of the Commission.[18]

In response to the emergency petitions and litigation turmoil, the Commission took steps to avoid an impending "'train wreck' that should not occur,"[19] and initiated this proposed rulemaking. In its Notice, the Commission has raised five questions:

1. To what extent, if any, does the Commission have authority to address the issues presented in the petitions?

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[15] U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, at 101 (1997) ["Copyright Office Report"].

[16] *Id.*

[17] *Id.* at 114.

[18] *Id.* at 115.

[19] Letter from Hon. William E. Kennard to Hon. John McCain and Hon. Tom Bliley (Sept. 4, 1998).

2. To what extent, if any, does the Commission have authority to change its definition of what constitutes a signal of Grade B intensity?

3. To what extent, if any, does the Commission have authority to develop a predictive standard for determining "unserved households" as defined by the SHVA and, if so, what methods should be developed to implement the standard?

4. To what extent, if any, does the Commission have authority to develop an easy-to-use and inexpensive method for testing the strength of a network signal at an individual household?

5. What other issues should the Commission address?

In proposing answers to these questions, Pegasus acknowledges the bedrock principles on which the SHVA is constructed: that copyright law should be respected; that localism in broadcasting and the network/affiliate relationship should be protected; that competition in the multichannel video programming marketplace between satellite and cable television should be promoted;[20] and that the needs of millions of Americans who, for a variety of reasons, cannot receive adequate network signals should be met. The Commission, in providing its own answers, should keep two "big picture" concerns in mind:

1. The public interest in balancing the television networks desire to protect their local "franchise"(*e.g.*, network/affiliate relationship) against importation of "distant signals" with the consumers' desire to receive network programming that cannot be received over-the-air from a local affiliate; and

2. The public interest in enabling satellite companies to become more effective competitors to cable television companies, which interest cannot be served if the satellite television industry is burdened by regulatory constraints that are more burdensome than those to which the cable television industry is subject.

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[20] *See, e.g.,* Satellite Home Viewer Act: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 100th Cong., 2d Sess. 83 (1988) (statement of Timothy A. Boggs on behalf of Motion Picture Association of America). *See also Advanced Communications Corporation*, 11 FCC Rcd 3399 (1995) (announcing the approval of an auction to speed the decision between mutually exclusive DBS applicants "[s]ince one of our primary goals is to expedite the provision of additional DBS service in order to foster competition both among DBS providers and between DBS and cable").

Finally, Pegasus agrees with the Commission that "an expedited rulemaking is necessary to protect satellite subscribers who are truly unserved from losing network service." 63 Fed. Reg. 67,442-43. The Commission should move expeditiously to exercise its statutory authority to define "over-the-air signal of Grade B intensity" in such a manner as to promote the public interest while remaining true to the SHVA.

ARGUMENT

I. The Commission Has Authority To Address The Issues Presented In The Notice Of Proposed Rulemaking[21]

The Commission tentatively concludes that Congress did not "freeze" the definition of Grade B intensity for SHVA purposes. *See* 63 Fed. Reg. 67,443. The Commission's conclusion is correct.

Neither the plain and unequivocal language of the statute nor the pertinent legislative history lead to a contrary conclusion that the Commission lacks authority and responsibility for the meaning of "an over-the-air signal of Grade B intensity." Congress paid careful heed to defining "unserved household," with respect to a particular television network, to mean a household that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. § 19(d)(10)(A) (emphasis added). If Congress had intended to "freeze" any particular Grade B definition which may have existed in 1988, it could have done so. It did not. If Congress had

[21] *See* attached letter to Ted S. Lodge from Michael J. Remington (dated December 9, 1998) regarding the authority conferred on the Commission by the Congress to address the issues presented in the proposed rulemaking.

intended to adopt a particular Grade B definition, it could have so stated in express statutory language or the legislative history. It did not.

When Congress has intended to incorporate Commission regulations into the Copyright Act as they existed on a certain date, as the Commission aptly observes, Congress has expressly done so. *See, e.g.,* 17 U.S.C. § 111(f) (expressly referring to Commission regulations "in effect on April 15, 1976"), 63 Fed. Reg. 67,443.

Moreover, the Commission is on firm ground in citing the cases of *Lukhard v. Reed*, 481 U.S. 368 (1989) and *Helvering v. Wilshire Oil Co.,* 308 U.S. 90 (1939) for the proposition that "a regulation interpreting a provision of one act [does not become] frozen into another act merely by reenactment of that provision." *Helvering,* 308 U.S. at 100-101. As the Supreme Court observed in *Lukhard*, "[i]t is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place." *Lukhard,* 481 U.S. at 379.

But, the Commission has never really defined "signal of Grade B intensity" for purposes of the SHVA. By not incorporating the language of any rule into the statute, the SHVA therefore defers to the Commission authority to define "signal of Grade B intensity." In such a circumstance, where Congress "has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). Not only does the Commission have the authority to define "signal of Grade B intensity," but the SHVA could be read to require that the Commission fill the gap left, implicitly or explicitly, by Congress. *See id.* at 843, quoting from *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

The Commission's regulatory authority remains circumscribed, however, by the express language of 17 U.S.C. § 119(d)(10) and the statutory definition of "unserved household" (words the Commission may not change) and the general policy parameters of the SHVA. However, the Commission is clearly authorized to develop a model for predicting objectively whether an individual household can receive a signal of Grade B intensity for purposes of the SHVA.

The concept of a Grade B signal is already a pliable predictive model for determining signal intensity over broad areas. As the Notice points out, the Commission currently uses different predictive models for determining the service areas of television stations depending on the purpose. For example, for exceptions to the cable syndicated exclusivity rules, the Commission relies upon its traditional Grade B contour schemes. *See* 63 Fed. Reg. 67,444. For digital television ("DTV") allocation purposes, the Commission uses the Longley-Rice predictive model. For purposes of determining compliance with the multiple ownership rules, the Commission has used a blended approach, relying on a predicted Grade B contour in some instances, but allowing an applicant to demonstrate that a different Grade B model should be used based on actual measurements.[22] In the Florida litigation, the federal court used a variant of the Commission's Longley-Rice methodology. For its part, the North Carolina court did not recognize any model for predicting Grade B intensity.

A consistent model for predicting, and accompanying rules for measuring, Grade B intensity are clearly necessary. The Commission is uniquely qualified to develop the model and rules.

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[22] *See, e.g., NewChannels Corp.*, 55 FCC 2d 623 (1975); *Teleprompter Corporation*, 91 FCC 2d 146 (1982) (accepting measurements to show actual Grade B contour of television station did not overlap with proposed cable system acquisition).

Finally, pursuant to the SHVA, the Commission's authority to define a "signal of Grade B intensity" reasonably includes authority to adopt a method of measuring signal intensity at the level of an individual household. In clear and unambiguous terms, the SHVA is concerned with the reception of adequate network television signals at individual households. It logically follows, that if the Commission is empowered to define Grade B intensity, that it would be able to tailor its definition to the individual "household" level.

Accordingly, the Commission is not only statutorily authorized to define its Grade B rules for purposes of the SHVA, but also should feel compelled to act.

II. The Commission Has Authority To Define What Constitutes A Signal Of Grade B Intensity

In its Notice, the Commission notes that it "has the authority, as a general matter, to revise any of its rules, as long as [it explains the] reasons for doing so." *See* 63 Fed. Reg. 67,444. In light of the SHVA's delegation of authority to the Commission, this proposition is irrefutable. Moreover, the Commission possesses general authority to act in the public interest by promoting satellite television as a viable competitor to cable television.[23]

When considering what latitude the Commission may have to amend its existing Grade B standards, or to create a separate definition of "signal of Grade B intensity" for purposes of the SHVA, some background is in order. Grade B signal standards were not developed for the purposes intended under the SHVA, but were developed in the early '50s in order to establish interference criteria to aid the Commission in licensing VHF and UHF spectrum outside of the

[23] *See, e.g.*, 47 U.S.C. § 548(a), which provides that: "The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies."

major markets. To develop these criteria, the Commission defined the concept of a Grade B signal to be particular signal field strength, defined in dBu, at which a median viewer would consider the received picture acceptable when it was assumed that the signal was being received via a 30 foot antenna properly oriented to the local broadcast station. These field strengths were used to define the Grade B contour.[24] The Grade B contour was defined to be a contour line in a rural environment within which it was predicted that 50% of the locations would receive an acceptable picture 90% of the time when it was assumed that the homes were utilizing a 30 foot antenna. The Commission then separately defined City Grade and Grade A contours. The Grade A contour was meant to define the location in an urban environment where a picture of acceptable quality would be expected to be received at 70% of locations, 90% of the time. *Sixth Report and Order on Television Assignments*, 41 FCC 148, 174-178 (1952).

The rules of the Commission recognize that the Grade A and Grade B contours do not guarantee that any particular point will receive any given level of signal. 47 C.F.R. § 73.683(b) ("the predicted field strength contours give no assurance of service to any specific percentage of receiver locations within the distances indicated"). Instead, these contours are theoretical constructs, adopted solely to give the Commission the ability to predict areas where a certain level of signal strength will be received from a given station. Being located within a particular contour provides no guarantee that any household in the defined area will receive such a signal. Instead, the contours, as explained above, only assume that a certain number of people will receive the signal a certain amount of the time (for the Grade B contour, it assumes that 50% of the locations will receive a signal of that intensity 90% of the time).

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[24] *See supra* n.6.

Even for those people who would receive this predicted signal, it does not guarantee that they will receive a television picture from the station, as the signal strength is only predicted to occur if the home has the 30 foot antenna, which in reality it may or may not have.[25] In addition, the Grade B contour in particular does not take into account any interference that may be received to the signal of the station from other stations operating on interfering channels. 47 C.F.R. § 73.684(a) ("All predictions of coverage made pursuant to this section shall be made without regard to interference"). The Commission's rules for NTSC operations assume that a certain amount of interference will occur within the Grade B contours of stations.[26] The rules for digital television build in an expectation of additional interference within the Grade B contour,[27] interference which has already been experienced in areas where digital television stations have commenced operations.

Over the past 40 years, the Commission has recognized the shortcomings of Grade A and Grade B contours, sanctioning the use of more precise predictive methods for various purposes (*e.g.*, Longley-Rice for considering change of transmitter locations and station overlaps, as well as the allocation of DTV licenses; the 35-mile limit for purposes of syndicated exclusivity and network non-duplication). In the past, the Commission has tailored its rules for special purposes. For example, as the Commission notes, for exceptions to the cable syndicated exclusivity rules and cross-ownership purposes, the Commission uses it traditional Grade B contour scheme, but

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[25] Particularly in today's world, where cable television is received in over two-thirds of all homes, the 30 foot high outdoor rooftop antenna is a less and less common sight.

[26] *See, e.g., Morehead City, North Carolina,* 50 Fed. Reg. 33,546 (1985), *reconsideration denied,* 2 FCC Rcd 4146 (1987); *aff'd, WITN, Inc. v. FCC,* 849 F.2d 1521 (D.C. Cir. 1988).

[27] *Advanced Television Systems, Memorandum Opinion and Order on Reconsideration of Sixth Report and Order,* 13 FCC Rcd 7418, 7450 (1998).

for DTV stations, the Commission uses the Longley-Rice predictive model. *See* 63 Fed. Reg. 67,444.

Significantly, nothing in Section 73.683 was ever contemplated by the Commission to define "Grade B intensity" for purposes of identifying an "unserved household" under the SHVA. The Commission has never defined such a standard, and in fact has nothing in its rules for predicting a level of signal strength at a given point. But, given the level of controversy that has arisen in the industry, the public interest, as well as the interests of both local broadcasters and satellite companies, will be best served by development by the Commission of a new predictive standard and rules for measuring it. Broadcaster plaintiffs in both the Florida and North Carolina cases accepted the proposition that the SHVA (and its definition of "unserved household") allows use of a predictive standard to establish an initial (rebuttable) presumption that a household is served or unserved. Pegasus suggests such a standard below.

III. The Commission Has Authority To Develop A Predictive Standard For Determining "Unserved Households" As Defined In The SHVA And Should Not Only Adopt A Standard But Also Methods To Apply The Standard

The clear words of the statute permit the Commission to promulgate a new definition of "signal of Grade B intensity" to meet the purposes of the SHVA. Because the SHVA speaks in terms of individual households, any new standard should look toward determining that, to the maximum extent possible, actual Grade B intensity at the individual household level is realized. The definition of "Grade B intensity" should also insure that each household receives a quality signal, free of multipath interference so that consumers do not have to tolerate "ghosting" before they qualify for DBS service.

In establishing such a definition, the Commission should consider a standard which all parties can apply with a minimum of analysis and dispute. In this regard, Pegasus urges that the

Commission first consider creating a well-defined geographic area wherein satellite service of a network signal is not permitted (a "red zone"). As the Copyright Office has explained,

> "[u]nder this [red zone] approach, the local markets of a network affiliate would be defined, and satellite carriers would be denied the compulsory license for a network signal for any subscriber who resides within the local market of an affiliate of that same network (*i.e.*, the "red zone").[28]

Such a "red zone" approach would promote certainty and efficiency. Within that zone, the satellite company would know that it cannot sell distant network service to a consumer; outside the zone, it would presumptively be free to provide the service subject to certain conditions developed by the Commission (a "yellow zone").[29]

Obviously, while postulating the creation of such zones is easy, and a zone (albeit one which appears unreasonable) has been adopted by the North Carolina court, the real crux of the issue is the size of the zone which should be adopted. In making this determination, the "big picture" factors discussed on page 8, *supra*, must be considered, namely (i) balancing a recognition of the legitimate contractual expectations of local network affiliates in the exclusivity for which they have contracted in their network affiliation agreements versus the public interest benefits of providing consumers a greater choice of programming sources, and (ii) not creating a

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[28] Copyright Office Report at 122. The Copyright Office proposal differs from that proposed herein. For example, the Office recommends that statutory reference to Grade B be dropped. This, of course, would have to be accomplished legislatively. The creation of a "red zone" concept by the Commission along the lines of network non-duplication rules for cable television, as proposed below, would not have to be done legislatively. Pegasus also suggests, *infra*, that a methodology for the prediction of a signal of Grade B intensity should be adopted by the Commission for use in a "yellow zone."

[29] The ideas submitted herein also differ from the "red light/green light" agreement negotiated between the National Association of Broadcasters ("NAB") and Superstar/Netlink Group, LLC ("SNG"). The NAB-SNG agreement has not been successful in implementing separate qualification systems and in reducing consumer confusion and anger. *See* Comments of SNG In the Matter of Echostar Communications Corporation, Petition for Declaratory Ruling and Rulemaking With Respect to Defining, Predicting and Measuring "Grade B Intensity" for Purposes of Satellite Home Viewer Act, at 9 (Sept. 25, 1998).

standard so onerous that it would prevent satellite carriers from being on a level playing field with other multichannel video providers.

Pegasus submits that the Commission has already established a standard for a "red zone" which meets these criteria, and which could easily be applied in this arena. The network non-duplication rules[30] have been developed to allow affiliate broadcasters to negotiate network programming exclusivity rights with their respective networks so that the network affiliate stations are the only ones authorized to broadcast network programming in their areas. Importantly, in its recent report, the Copyright Office reminds that the "unserved household" provision was "modeled after a regulation of the . . . Commission . . . the network non-duplication rule . . . ."[31] Under network nonduplication rules, the affiliate's area of protection is determined by the express terms of a programming contract with its network, but the area of protection cannot exceed an area more than 35-miles from the broadcast station.[32] Within that area, a station has exclusive use of the network programming, and can prevent distant affiliates from providing network programming to cable systems in that area.[33] Outside of that area, cable systems are allowed to carry the signal in its entirety of a distant network station. In effect, these rules already establish the zone in which a network affiliate has a legitimate expectation of having the sole and exclusive use of network programming.

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[30] 47 C.F.R. §§ 76.92-76.97.

[31] Copyright Office Report at 99.

[32] That zone is extended to 55 miles in smaller market television stations, as defined by 47 C.F.R. § 76.5.

[33] There are certain exceptions to the ability of a station to prevent the carriage of distant affiliates on a cable system (e.g. the signal cannot be preempted if the cable system is within 55 miles of a major market distant signal station, or if the distant station is significantly viewed in the county in which the cable system is located). Those exceptions are, for the most part, not relevant to SHVA considerations.

In its original establishment of the exclusivity zone in connection with distant signal retransmission and must carry issues, the Commission engaged in a balancing act almost identical to the one it is forced to contend with in the instant proceeding. There, the Commission was forced to weigh the competing interests of the television broadcast stations versus those of the cable system. In words which could just as well have been written about this proceeding, the Commission stated about that decision:

> The 35-mile zone . . . was based on experience and on analysis of a number of representative markets. The comments directed toward the size of the zone were predictably split: cable interests desired smaller zones, broadcasters, larger ones. We are not convinced that our proposal for a 35-mile zone should be changed in either direction. The zone is particularly effective for UHF stations . . . that have the substantial share of their audience within the 35-mile zone. In addition . . . a fixed mileage standard has the advantage of administrative ease and provides certainty to the affected industries.[34]

For those same reasons -- ease of administration and certainty for the industries -- the Commission should exercise its authority to establish a presumptive Grade B "red zone" of 35-miles. This standard will balance the interests of broadcasters (national and local), providing them with the certainty of the same network exclusivity protection that they are entitled to under other provisions of the Commission's rules, and the satellite operators, making clear that they cannot import distant network affiliates in the same areas in which their principal competitors, the cable systems, are prohibited from doing so. Because the SHVA does not itself prescribe a predictive standard, the Commission has the authority to prescribe a standard that meets the level playing field criterion so long as such a standard does not actually conflict with the provisions of the SHVA. This standard does not conflict, serves the public interest, and should be adopted.

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[34] *Cable Television Report and Order*, 36 FCC 2d 143, 172 n.38 (1972).

The area outside of the 35-mile zone presents a different situation, one which perhaps should be characterized as a "yellow zone." In other words, the satellite carrier may offer distant network signals to homes within that area, but it must proceed with caution, subject to the rules suggested below. Outside of the 35-mile zone, Pegasus proposes use of a methodology that would provide an accurate prediction of whether an individual household can receive an acceptable network signal: to wit, that the satellite carrier be allowed to provide distant network service if the home is in an area not predicted to receive a Grade B signal using a Longley-Rice predictive measurement. However, because the homes beyond the 35-mile zone are beyond the area in which a television station would have exclusivity protection versus a cable system, to preserve some degree of a level playing field between DBS and cable, Longley-Rice could be utilized with certain modifications to that which is traditionally utilized for other broadcast purposes.[35]

Longley-Rice, while accounting for the terrain in a particular area far better than does the Commission's traditional predicted Grade B contour, still contains certain assumptions not appropriate in the development of a model for predicting television coverage at the household level. Initially, Longley-Rice still assumes a 30 foot high receiving antenna. Such an assumption may have been appropriate in the '50s, when a typical home had one television set attached to an antenna, as there was no way of receiving a signal other than over-the-air. In such an environment, particularly as many stations in smaller markets had not yet begun operations, it

[35] The Commission specifically raises numerous questions regarding use of the Longley-Rice propagation model. *See* 63 Fed. Reg. 67445-46. The Commission requests comments not only on the general proposal to use the Longley-Rice model in the SHVA context, but also on a series of highly technical questions. Pegasus responds with general comments and reserves its rights to answer more specifically in reply comments.

was appropriate to assume that most households would have outdoor roof top antennas so as to receive the limited number of over-the-air signals which then were in existence.

Today, such a presumption no longer applies. As the rates of cable television penetration nationwide approach 70%, and as DBS now serves a significant number of households, it is reasonable to assume that the majority of all households no longer have an outdoor, rooftop antenna. In addition, second and even third television receivers in a home are not at all uncommon, with these additional sets either connected to cable or of a more portable nature, using only a "rabbit ears" antenna for reception purposes. In today's television environment "outdoor rooftop" antennas are no longer commonplace, and thus the Commission should adopt a standard that more closely comports with today's realities yet that still meets the minimal requirements of the SHVA for an antenna height that would be "conventional" for outdoor rooftop antennas. Pegasus suggests that 15 feet would be a more appropriate standard.

In addition, Longley-Rice, like Grade B, is predicated on the concept of a median viewer in a given area being able to receive a Grade B field intensity signal at only 50% of the locations, 90% of the time. Thus, the Longley-Rice assumptions themselves indicate that half of the receivers in a given area may not be able to receive the anticipated signal strength. Pegasus suggests that the assumption level for these predictions should be raised so that predicted interference free coverage will be received at 75% of the locations, 90% of the time. This will increase the certainty that an individual household will receive an acceptable signal from their local affiliate before they are deprived of the reception by satellite of a substitute network service.

Pegasus believes that the adoption of a modified Longley-Rice prediction methodology would be an affirmative step towards a proper balancing of the competing interests of the

television station and the DBS provider. Pursuant to the ideas set forth herein, the television operator would obtain certainty within the core of its service area that a competing network signal would not be introduced while, in the more outlying areas, the prediction methodology would be more likely to insure that a home is actually receiving a usable and adequate Grade B signal from a local station before depriving that home of the ability to receive a substitute network service.

Pegasus also believes that the Commission should look to state-of-the-art predictive methodologies that more accurately predict "signal of Grade B intensity" for purposes of the SHVA. One such methodology is based on the Terrain-Integrated Rough Earth Model ("TIREM") which was developed by the National Telecommunications and Information Administration, acting for the U.S. Department of Defense. TIREM and its successor (TIREM-2) are non-proprietary and offer state-of-the-art technology, including geocoding and mapping capabilities, that should be carefully explored by the Commission.

IV. The Commission Has Authority To Develop An Easy-To-Use And Inexpensive Method For Testing The Strength Of A Network Signal At An Individual Household And Should Do So

The system advocated by Pegasus in the foregoing sections should help to resolve many of the contentious issues as to whether or not a particular area is entitled to receive distant network service, by establishing certain presumptions. Even so, in the case of individual households, disputes may still arise. The Commission aptly observes that "individual testing is the key safety net mechanism under the SHVA for proving that a specific household is unserved and thus eligible under the law to receive satellite delivery of network affiliated television stations." 63 Fed. Reg. 67,446.

As a starting point, any testing methodology must be simple, inexpensive, and easy to use, and must approximate real world conditions. The testing methodology set out in Section 73.686 of the Commission rules simply does not provide such flexibility. That standard was adopted in measuring areas of service to answer fundamental questions concerning television operations, such as whether or not a station could be constructed at a particular location, or co-owned with another facility. In such cases, the outcomes may result in significant economic decisions and meet important regulatory objectives, and thus demand a detailed examination which, by its very nature, is also quite expensive.

In contrast, the measurements called for under the SHVA are taken in an entirely different context, where the economic results are far less significant. Given the impact that measurements may have one way or the other, it simply does not make sense to spend significant resources of either a television station or a satellite service provider to measure the field strength at a particular household in the manner prescribed by Section 73.686. Therefore, the Commission should prescribe procedures for conducting acceptable signal tests by consumers, by satellite companies and by broadcasters that are simple and inexpensive and can be conducted promptly.

Additionally, the Commission should consider sanctioning inexpensive measurement devices (perhaps even incorporated in off-air antennas, DBS set top receivers and TV's) whose output would be accepted for purposes of determining Grade B signal intensity and whose output could also be transmitted to a national database of geocoded households. Over time, it could be expected that such a database might effectively "map" most areas in which signal reception was problematic and might therefore also be a resource of significant benefit to broadcasters in considering changes or improvements to their broadcast facilities.

Finally, pursuant to the SHVA, the Commission does not have the authority (nor do the courts) to require measurement of Grade B signal intensity using a 30 foot master antenna unless the Commission determines that such an antenna constitutes a "conventional outdoor rooftop antenna." As set forth in the previous section, history would suggest that the Commission did not consider such an antenna "conventional" even in the 50's. It certainly is not so today. The Commission should therefore take the initiative to define more precisely what closely correlates with today's realities and, as set forth above, it should conclude that an appropriate height assumption would be 15 feet above ground.

V. Consistent With Its Statutory Authority, The Commission Should Address Any Other Issues That Are Necessary And In The Public Interest

One further issue deserves comment. Pursuant to Section 335(a) of the Communications Act of 1934, Congress instructs the Commission to:

> "examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service."[36]

The Commission should exercise its Section 335 authority, particularly when considering technological issues, to endorse or stimulate the creation of an industry working group (with representatives of the satellite and television broadcast industries) to develop and implement solutions. Many of the proposals and issues addressed in the Notice and in these comments are not capable of quick fixes or easy answers. However by working together, the broadcast and satellite industries should be able to craft solutions to the thorny issues that divide them,

[36] 47 U.S.C. § 335(a); *see* 63 Fed. Reg. 67,447.

particularly by deriving technological solutions to testing and analysis of signal strengths at the level of the individual household.

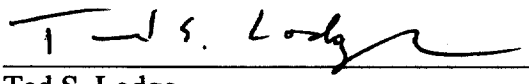
CONCLUSION

For the foregoing reasons, the Commission has statutory authority to engage in this proposed rulemaking and should take immediate steps to define what constitutes a signal of Grade B intensity" for purposes of the SHVA. The definition should include a "red zone" of 35-miles within which a satellite carrier cannot offer distant network signals at all, as well as a cautionary "yellow zone" whereby a satellite carrier would be allowed to provide distant network signals under a predictive measure of "Grade B intensity" (either using a modified Longley-Rice approach or a new state-of-the-art predictive technology) that more adequately reflects the concept of "unserved household." Although these changes would help to resolve much of the current turmoil in the satellite and broadcasting industries, the Commission should still create a cost-effective and expeditious testing mechanism for individual households.

In conclusion, the public interest will best be served by new regulations that keep two overreaching principles in mind: (1) balancing the dual interests of broadcasters to protect the network/affiliate relationship and localism with consumer's desires to receive network

programming that cannot be received over-the-air from the local affiliate; and (2) promoting competition in the area of multi-channel video programming in a regulatory environment that is not more burdensome to the satellite television industry than to the cable television industry. These principles can be achieved by the Commission while remaining faithful to the SHVA.

Respectfully submitted,



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Dated: December 11, 1998

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December 9, 1998

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Dear Mr. Lodge:

Since July of 1996, I have been a partner in the Washington, D.C. office of Drinker Biddle & Reath LLP, a law firm with its home office in Philadelphia, which represents the interests, in part, of Pegasus Communications Corporation. I am a specialist in intellectual property law.

Previously, from 1983 until 1991, I served as Chief Counsel of the Subcommittee on Courts, Intellectual Property and the Administration of Justice ("Subcommittee") (under the chairmanship of Robert W. Kastenmeier of Wisconsin) of the House Committee on the Judiciary. In that capacity, I held the principal staff position for the Subcommittee and not only served the Chairman in a variety of capacities, but again specialized in matters relating to intellectual property. For example, I served as "lead counsel" to the Subcommittee that produced over 20 public laws relating to copyright and patent law, including the 1988 Satellite Home Viewer Act ("SHVA"), the Semiconductor Chip Protection Act of 1984, the Berne Convention Implementation Act of 1988, and the Architectural Works Copyright Protection Act of 1990.

I also served the Committee on the Judiciary in two other capacities: from 1977 to 1981 as counsel specializing in court reform and the administration of justice; and from 1991 to 1992 as a special transition counsel to assist the new Chairman of the Subcommittee on Intellectual Property and Judicial Administration (William Hughes of New Jersey) specifically in matters relating to intellectual property.

By way of background, the 1988 SHVA took almost three years (1985-1988) to enact. From initial identification of the issues addressed in the legislation to final enactment, the Chairman of the Subcommittee, Robert W. Kastenmeier, played a pivotal role in the legislative process. He chaired all four days of hearings held by Congress (no hearings were held in the

Senate) on issues regarding the copyright liability of satellite carriers for the retransmission of television broadcast signals and the creation of a statutory license to permit satellite retransmissions under certain circumstances. See Copyright and New Technologies: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 99th Cong. 1st & 2nd Sess. (1985-86); see also Satellite Home Viewer Act: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 100th Cong. 1st & 2nd Sess. (1987-88). Chairman Kastenmeier also served as chief sponsor of the legislative reform proposal (H.R. 2848) that ultimately was enacted into law, authored the principal House Committee report, and served as floor manager for debate in the U.S. House of Representatives. I served at his side during every step in the process.

Chairman Kastenmeier's leadership role does not detract from the contributions of several other members of Congress: Representatives Synar, Boucher and Moorhead (all of whom served both on the Kastenmeier Subcommittee and the House Committee on Energy and Commerce, which received a sequential referral), Representatives Markey, Rinaldo and Tauzin (who led the bill through the Commerce Committee), and Senators Leahy, DeConcini, Hatch and Hollings (who steered the House-passed bill through the Senate).

Based on personal experience and having, pursuant to your request, examined the specific provision in the SHVA that creates an exception to the exclusive copyrights of television networks and affiliates in their programming by permitting the retransmission of network signals to persons who reside in "unserved households" – the so-called "white area" provision -- I am of the view that the Federal Communications Commission ("Commission") has been delegated by Congress some authority to define "signal of Grade B intensity" for purposes of the SHVA, or to redefine its current definition of "Grade B" to meet the purposes of the SHVA. In this regard, the Commission is authorized to develop an objective standard for predicting whether a household can receive a signal of Grade B intensity for purposes of the SHVA and the Commission may further adopt methods to apply the standard.

Neither the plain meaning of the statute nor the pertinent legislative history lead to a contrary conclusion that the Commission lacks authority and responsibility for the meaning of "an over-the-air signal of Grade B intensity." In the "white area" amendment that was offered and accepted in the Judiciary Committee, and ultimately enacted into law, Congress carefully defined "unserved household" to mean, with respect to a particular television network, a household that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10) (emphasis added). If Congress had intended to "freeze" any particular Grade B definition that may have existed in 1988, it could have easily accomplished this objective by adding a date "as

of . . . ." The Judiciary Committee worked closely with its counterpart Commerce Committee which has oversight jurisdiction over the Commission's statutory charter and activities. Drafts of the proposed legislation were freely shared between the two committees and, indeed, with the Commission which had informal input in the drafting process. If Congress had intended to reduce the Commission's regulatory authority, the statute (or at the least the legislative history) would have so stated.

In conclusion, by using the words "as defined by the Federal Communications Commission" and be not freezing the language of any rule into the statute, Congress has delegated authority to the Commission either to define "signal of Grade B intensity" or to redefine "Grade B" as that definition existed as the time of the Act (*see* 47 C.F.R. § 73.683(a)). Implicitly, the Commission has authority to develop an objective, predictive standard and also methods to apply the standard. The Commission's authority remains circumscribed, however, by the express language of 17 U.S.C. § 119(d)(10) – which sets forth the statutory definition of "unserved household" (words that the Commission may not change) – and the policy parameters of the SHVA.

Sincerely,

Michael J. Remington

MJR/caq